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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

STEPHEN DRAGASITS,

Plaintiff,

v.

DR. JIN YU,

Defendant.

Case No. 16-cv-1998-BAS-JLB

ORDER:

- (1) APPROVING AND
ADOPTING REPORT
AND RECOMMENDATION
[ECF No. 58];**
- (2) GRANTING DEFENDANT
YU’S MOTION TO DISMISS
[ECF No. 51];**
- (3) DISMISSING WITH
PREJUDICE SECTION 1983
CLAIMS IN THE SECOND
AMENDED COMPLAINT
[ECF No. 50];**
- (4) DECLINING TO EXERCISE
SUPPLEMENTAL
JURISDICTION OVER
STATE LAW CLAIMS;

AND**
- (5) CLOSING CASE**

1 Plaintiff Stephen Dragasits, a state prisoner proceeding *pro se* and *in forma*
2 *pauperis*, filed this suit in August 2016 against ten defendants at the R.J. Donovan
3 Correctional Facility (RJD), alleging violations of his Eighth and Fourteenth
4 Amendment rights under Section 1983 and a host of California state law claims, all
5 stemming from a lower bunk chrono Plaintiff desired. (ECF Nos. 1, 5.) Nearly two
6 and half years later after a mandatory screening of Plaintiff's complaint and two prior
7 motion to dismiss orders, the case remains at the pleading stage. The operative
8 Second Amended Complaint (SAC) alleges First and Eighth Amendment claims
9 under Section 1983 and several state law claims against remaining Defendant Yu.
10 (ECF No. 50.) Yu has moved to dismiss. (ECF No. 51.)

11
12 On January 15, 2019, Magistrate Judge Jill Burkhardt issued an extensive
13 Report and Recommendation (R&R) on Defendant Yu's motion to dismiss the SAC.
14 (ECF No. 58.) Judge Burkhardt recommends that the Court grant Yu's motion,
15 dismiss with prejudice Plaintiff's federal claims against Yu, and decline supplemental
16 jurisdiction over any state law claims. (*See generally* ECF No. 58.) Objections to the
17 R&R were due by February 12, 2019. (*Id.* at 23.) This Court *sua sponte* extended
18 the time for Plaintiff to file any objections until February 27, 2019. (ECF No. 61.)
19 The Court has not received a timely objection from Plaintiff.

20
21 For the following reasons, the Court (1) approves and adopts the R&R in its
22 entirety, (2) grants Defendant Yu's motion to dismiss the SAC, (3) dismisses
23 Plaintiff's Section 1983 claims, (4) declines to exercise supplemental jurisdiction
24 over Plaintiff's state law claims, and (5) closes this case.

25 26 **DISCUSSION**

27 The Court reviews *de novo* those portions of an R&R to which objections are
28 made. 28 U.S.C. § 636(b)(1). The Court may "accept, reject, or modify, in whole or

1 in part, the findings or recommendations made by the magistrate judge.” *Id.* “The
2 statute makes it clear,” however, “that the district judge must review the magistrate
3 judge’s findings and recommendations *de novo if objection is made*, but not
4 otherwise.” *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en
5 banc) (emphasis in original); *see also Schmidt v. Johnstone*, 263 F. Supp. 2d 1219,
6 1226 (D. Ariz. 2003) (concluding that where no objections were filed, the district
7 court had no obligation to review the magistrate judge’s report). “Neither the
8 Constitution nor the statute requires a district judge to review, *de novo*, findings and
9 recommendations that the parties themselves accept as correct.” *Reyna-Tapia*, 328
10 F.3d at 1121. This legal rule is well-established in the Ninth Circuit and this district.
11 *See Wang v. Masaitis*, 416 F.3d 992, 1000 n.13 (9th Cir. 2005) (“Of course, *de novo*
12 review of a[n] R & R is only required when an objection is made to the R & R.”);
13 *Nelson v. Giurbino*, 395 F. Supp. 2d 946, 949 (S.D. Cal. 2005) (Lorenz, J.) (adopting
14 report in its entirety without review because neither party filed objections to the report
15 despite the opportunity to do so); *see also Nichols v. Logan*, 355 F. Supp. 2d 1155,
16 1157 (S.D. Cal. 2004) (Benitez, J.).

17
18 In this case, the deadline for Plaintiff to file any objections to the R&R was
19 February 27, 2019. (ECF No. 61.) No timely objections have been lodged.
20 Consequently, the Court may adopt the R&R on that basis alone. *See Reyna-Tapia*,
21 328 F.3d at 1121. Nonetheless, having conducted a *de novo* review of the SAC, the
22 motion to dismiss papers, and the R&R, the Court concludes that Judge Burkhardt’s
23 reasoning is sound and her recommendations are proper.

24
25 *First*, Plaintiff’s 56-page SAC, accompanied by 326 pages of exhibits, is
26 subject to dismissal pursuant to Rule 8 because it is overly verbose, repetitive, and
27 fails to comply with the page limitations applicable to prisoner civil rights complaints
28 and multiple court orders regarding these limitations. Fed. R. Civ. P. 8; S.D. Cal.

1 L.R. 8.2 (“[c]omplaints by prisoners under the Civil Rights Act, 42 U.S.C. § 1983”
2 are to be written on forms “supplied by the court” and any “additional pages [are] not
3 to exceed fifteen (15) in number.”); (ECF Nos. 46, 47; *see also* ECF No. 58 at 11.)
4

5 *Second*, Plaintiff has re-alleged an Eighth Amendment claim pertaining to his
6 lower bunk chrono, which the Court has already found does not state a claim. The
7 claim is therefore subject to dismissal once more. (ECF No. 58 at 11–12.)
8

9 *Third*, Plaintiff’s newly alleged First Amendment retaliation claim against
10 Defendant Yu fails to state a claim. (*Id.* at 12–19.) An inmate suing a prison official
11 for retaliation pursuant to Section 1983 must allege sufficient facts that show: (1) the
12 prison official took some adverse action against the inmate (2) because of (3) the
13 inmate’s protected conduct and that the adverse action (4) chilled the inmate’s
14 exercise of his First Amendment rights and (5) did not reasonably advance a
15 legitimate penological purpose. *Rhodes v. Robinson*, 408 F.3d 559, 567–68 (9th Cir.
16 2005).
17

18 Although an inmate must “allege a causal connection between the adverse
19 action and the protected conduct,” *Watison v. Carter*, 668 F.3d 1108, 1114 (9th Cir.
20 2012), Plaintiff cannot show a causal connection between his May 13, 2015 appeal of
21 Yu’s decision not to renew Plaintiff’s lower bunk chrono and Yu’s June 5, 2015
22 follow-up decision not to renew. As Judge Burkhardt reasoned, unlike Plaintiff’s
23 opposition to Defendants’ second motion to dismiss, Plaintiff omits any allegations
24 of retaliatory motive by Yu. (ECF No. 58 at 15.) Setting aside Plaintiff’s failure to
25 allege such a motive, there is also no chronology of events from which retaliatory
26 motive can be inferred. Yu had already decided to deny Plaintiff’s request for a lower
27 bunk chrono before Plaintiff ever pursued his May 13, 2015 appeal and expressly told
28 Plaintiff he would review Plaintiff’s x-rays to better understand the medical issues.

1 (*Id.* at 16.) Yu’s June 5, 2015 follow-up decision—which Plaintiff points to as
2 retaliation—was expressly based on Plaintiff’s lack of medical need as reflected in
3 Plaintiff’s x-rays, consistent with the statements Yu made when he first denied
4 Plaintiff’s request. (*Id.*) These circumstances do not plausibly show that Yu had a
5 retaliatory motive against Plaintiff for the appeal.

6
7 Although Plaintiff’s failure to show that Yu possessed a retaliatory motive is
8 sufficient to dismiss Plaintiff’s First Amendment claim, the Court additionally agrees
9 with Judge Burkhardt’s conclusions regarding other elements of a First Amendment
10 retaliation claim. Plaintiff has failed to allege that Yu’s decision not to renew
11 Plaintiff’s chrono would chill a person of ordinary firmness from further appeal of the
12 decision given that Yu in fact encouraged Plaintiff to pursue his appeal. (*Id.* at 17–
13 18.) Plaintiff has otherwise failed to show that Yu’s decision lacked a legitimate
14 penological interest because “the medical documents Plaintiff attaches to his SAC are
15 replete with evidence that Defendant Yu’s decision reflected his medical judgment
16 based upon the medical record before him.” (*Id.* at 18.)

17
18 *Fourth*, the Court agrees that because Plaintiff has failed to allege First and
19 Eighth Amendment violations for his federal Section 1983 claims, it is proper for the
20 Court to decline supplemental jurisdiction over the SAC’s state law claims. (ECF
21 No. 58 at 19); *see* 28 U.S.C. § 1367(c)(3); *Acri v. Varian Assocs., Inc.*, 114 F.3d 999,
22 1001 (9th Cir. 1997) (en banc) (“[I]n the usual case in which all federal-law claims
23 are eliminated before trial, the balance of factors . . . will point toward declining to
24 exercise jurisdiction over the remaining state law claims.”). Dismissal of Plaintiff’s
25 claims obviates the need to address Plaintiff’s requests for injunctive relief because
26 such requests are not independent claims. *See Pemberton v. Nationstar Mortg. LLC*,
27 331 F. Supp. 3d 1018, 1063 (S.D. Cal. 2018).

1 *Fifth*, and finally, the Court agrees that Plaintiff should not be permitted leave
2 to amend his Section 1983 claims. (ECF No. 58 at 21–22.) Plaintiff has already been
3 permitted to amend his pleadings twice. Despite these opportunities, Plaintiff has
4 repeatedly failed to correct expressly identified deficiencies in his Eighth Amendment
5 claim. *See Smith v. Solis*, 331 Fed App’x 482, 482-83 (9th Cir. 2009) (“The district
6 court properly dismissed the action with prejudice because Smith’s second amended
7 complaint did not state a claim for deliberate indifference and [pro se plaintiff] Smith
8 failed to correct the defects.”). Plaintiff has also failed to allege in his First
9 Amendment claim the very facts which this Court found warranted a final opportunity
10 to amend to add such a claim despite the fact that Plaintiff did not raise a whiff of a
11 First Amendment claim until Defendants moved to dismiss for a second time. It is
12 not an abuse of discretion to deny Plaintiff a third opportunity to amend his pleadings.
13 *See, e.g., Dutciuc v. Meritage Homes of Ariz., Inc.*, 462 Fed. App’x 658, 660 (9th Cir.
14 2011) (plaintiff failed to show that district court abused its discretion in refusing to
15 allow a fourth amended complaint). Any amendment by Plaintiff to his First
16 Amendment claim would also be futile because Plaintiff cannot allege any facts that
17 would show that Defendant Yu’s actions created a chilling effect or did not reasonably
18 advance a legitimate correctional goal. (ECF No. 58 at 22.) It is therefore appropriate
19 to deny Plaintiff leave to amend his First and Eighth Amendment claims.
20 Accordingly, the Court approves and adopts the R&R in its entirety.

21 22 **CONCLUSION & ORDER**

23 For the foregoing reasons, the Court **APPROVES AND ADOPTS** the R&R
24 (ECF No. 58) and **GRANTS** Defendant Yu’s motion to dismiss (ECF No. 51). The
25 Court **DISMISSES WITH PREJUDICE** Plaintiff’s Section 1983 claims against
26 Defendant Yu and **DECLINES TO EXERCISE** supplemental jurisdiction over the
27 state law claims asserted in the SAC pursuant to 28 U.S.C. § 1367(c)(3). The Clerk
28 of the Court shall close the case.

1 **IT IS SO ORDERED.**

2 **DATED: March 6, 2019**

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